

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2007 Session

JANET HUGHES MOORE v. BARRY PIERCE MOORE

**Direct Appeal from the Chancery Court for Rutherford County
No. 06-0106-DR J. Mark Rogers, Judge**

No. M2006-02624-COA-R3-CV - Filed March 19, 2008

The sole issue presented in this appeal is the trial court's award of periodic alimony to the wife in the sum of \$650.00 per month until she reached the age of 62. The trial court granted the parties' divorce pursuant to Tenn. Code Ann. § 36-4-129(b). The husband appeals the trial court's award of periodic alimony arguing that an award of transitional alimony \$450.00 is the proper award. We modify the judgment of the trial court and award transitional alimony for a period of three years in the sum of \$450.00 per month.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J. and ANDY D. BENNETT, J., joined.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellant, Barry Pierce Moore.

Derek Ray Howard and Diana Benson Burns, Murfreesboro, Tennessee, for the appellee, Janet Hughes Moore.

OPINION
Factual Background

The parties were married on August 13, 1992. At the time of their marriage, the wife had one minor child, Caitlyn, from a prior marriage whom the husband later adopted. After 14 years of marriage, the wife filed for divorce on January 20, 2006. At the time of the hearing on the divorce, the wife was 49 years of age and the husband was 54. The wife was employed by Cigna Government Services. She has been in that employment for 16 years. At the time of the divorce hearing, her annual salary was \$35,099.66. She also received \$66.15 per week as child support from Caitlyn's biological father.

Since 1994, the husband has been employed with Ford Motor Credit. His annual salary was \$70,027.44. The record reflects that the parties owned various joint property.¹ The marital home was sold prior to the hearing on the divorce. Each party received \$28,300 from the proceeds of the sale. An additional \$14,000 was retained in a trust account pending the final hearing. The trial court granted each party \$7,075.89 from this trust account. Each party had a pension account through their employer and a 401(k). Pursuant to the child support guidelines, the husband was ordered to pay child support in the sum of \$633.00 per month until May 2007, when Caitlyn would reach 18 years of age. Finally, the trial court ordered the husband to pay the sum of \$650.00 per month as periodic alimony. This obligation would continue until September 2019 when the wife reached the age of 62. It is from this award of periodic alimony that husband appeals.

Standard of Review

Rule 13(d) Tennessee Rules of Appellate Procedure provides that a review of findings of fact by the trial court shall be *de novo* upon the record with a presumption of correctness, unless the preponderance of the evidence is otherwise. *McCarty v McCarty*, 863 S.W.2d 716 (Tenn. Ct. App. 1992). Questions of law are afforded *de novo* review without any presumption of correctness. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). Tennessee public policy favors rehabilitative alimony in cases which a spouse is economically disadvantaged. Tenn. Code Ann. § 36-5-121(d)(2). Long term support and maintenance is appropriate where there is a relative economic disadvantage and rehabilitation of the disadvantaged party is not feasible. *Crawford v. Crawford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989). Transitional alimony means a sum of money by one party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce. Tenn. Code Ann. § 36-5-121-(q)(1). The amount of alimony is largely a matter left to the discretion of the trial court, and the appellate courts will not interfere except in a case of abuse of discretion. *Crabtree v. Crabtree*, 165 S.W.3d 356, 360 (Tenn. 2000).

Analysis

The trial court found that there was a disparity between the economic positions of the parties and their earning capacity. Thus, the trial court found the wife to be economically disadvantaged. We will examine the award of alimony in light of the statutory factors contained in Tenn. Code Ann. § 36-5-121.

The marriage was of 14 years duration. The wife was 49 years of age at the time of the divorce and the husband was 54 years old. The wife testified that she was “fairly healthy.” There is nothing in the record to suggest that the husband is not in good health. It appears from the record that both parties enjoy good mental health, although the wife has experienced some stress as a result

¹ Since the only issue on appeal is the award of alimony, the Court will not discuss the division of the marital assets by the trial court.

of these proceedings. The parties do not have any physical disabilities that would prevent their continued employment and both parties indicated an intention to continue their present employment. The minor child has reached majority. The parties had no separate property and the trial court has made an equitable division of their marital assets. In addition to the equity in the marital residence, both parties have a vehicle and household furnishings. Both parties have pensions and 401(k)s. Both parties have assumed a credit card debt. Husband and wife retained their separate bank accounts. Both parties contributed to their lifestyle, maintenance and support. The trial court found each party to be at fault in the dissolution of the marriage. The most salient factor in reviewing the trial court's award of alimony is the earning capacity, obligations, need, and financial resources of each party. The wife currently earns \$36,000. She has not sought promotions or a managerial position in the past because of her desire to spend time with her minor child. The wife testified that after she was settled, there would be no reason why she could not seek a promotion in her employment. Until 1997, the parties' earnings were relatively equal. After that year, the husband received three promotions that increased his income to his present salary. Both parties filed income and expense statements reflecting their current economic situation. Including the child support she received from the biological father of the minor child, the wife's statement reflected a monthly net income of approximately \$2,400.00. Her expenses were \$2,965.00 leaving a monthly deficiency of approximately \$600.00. However, included in the wife's expenses were items that included the expenses of the minor child, such as clothing, groceries, haircuts and school. These expenses are no longer applicable because the child is now 18 years of age. The wife testified that she desires to purchase a new home and needs funds to accomplish this purpose. However, the wife has approximately \$35,000.00 available for this purchase as a result of the equity received from the sale of the marital residence.

The husband's income and expenses statement reflects a monthly income of \$4700.30. Prior to the divorce, the husband utilized a portion of his proceeds from the sale of the house to purchase a new home. During the pendency of the divorce, the husband reduced the marital debt on the marital home allowing the parties to enjoy an increase in the equity in the home. The husband, also, discontinued his contributions to his 401(k) retirement fund in order to pay the marital debts and child support. An award of alimony in the sum of \$650.00 per month plus his other expenses would result in his monthly obligation being equal to or greater than his monthly income. The trial court's award is beyond the husband's ability to pay. There is nothing in the record to indicate that the trial court considered the husband's ability to pay. We find that the failure to consider this factor was in error. However, we find that this case is appropriate for an award of transitional alimony in order to assist the wife in her adjustment to the economic consequences of this divorce. And, accordingly, we modify the trial court's judgment granting periodic alimony and award transitional alimony in the sum of \$450.00 per month for a period of three years.

In conclusion, we modify the judgment of the trial court and award transitional alimony for a period of three years in the sum of \$450.00 per month. In all other respects, the judgment of the trial court is affirmed. This cause is remanded to the trial court for the collection of costs. Costs on appeal are assessed equally between the parties.

JON KERRY BLACKWOOD, SENIOR JUDGE